NOOR ASHID SAKIB

v.

KETUA POLIS NEGARA

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL APPLICATION NO: 44-6-01]
9 SEPTEMBER 2001

PREVENTIVE DETENTION: *Detention - Application for habeas corpus - Detainee arrested and detained under s. 73 Internal Security Act 1960 - Whether detention made in exercise of valid legal power - Whether grounds for detention open to judicial review - Whether detainee informed of grounds of arrest - Whether right to counsel denied - Internal Security Act 1960, ss. 8, 73 - Federal Constitution, art. 5(2), (3)*

PREVENTIVE DETENTION: *Detention order - Whether order of detention of minister open to judicial review - Internal Security Act 1960, ss. 8, 73 - Federal Constitution, art. 5(2), (3)*

CONSTITUTIONAL LAW: *Fundamental liberties - Detention - Habeas corpus - Detainee arrested and detained under s. 73 Internal Security Act 1960 - Whether detention made in exercise of valid legal power - Whether grounds for detention open to judicial review - Whether detainee informed of grounds of arrest - Whether right to counsel denied - Internal Security Act 1960, ss. 8, 73 - Federal Constitution, art. 5(2), (3)*

CRIMINAL PROCEDURE: *Habeas corpus - Detainee arrested and detained under s. 73 Internal Security Act 1960 - Whether detention made in exercise of valid legal power - Whether grounds for detention open to judicial review - Whether detainee informed of grounds of arrest - Whether right to counsel denied - Internal Security Act 1960, ss. 8, 73 - Federal Constitution, art. 5(2), (3)*

This was an application for a writ of *habeas corpus* filed by the wife of the applicant on his behalf for his release before the court. The applicant was detained under s. 73 of the Internal Security Act 1960 ('ISA') and the issues were: (1) whether there was lawful detention; (2) whether the applicant's right to counsel was denied; and (3) whether exh. FM1 which was delivered to the wife of the applicant at the time of his arrest and detention sufficiently stated the grounds of his arrest.

Held:

[1] Article 5(3) of the Federal Constitution ('the Constitution') provides that whenever the liberty of a person is deprived and a complaint is made, the court shall inquire into the complaint and unless satisfied that the detention is lawful shall order him to be produced before the court and release him. The preceding art. 5(1) provides that no person shall be deprived of his life or personal liberty save in accordance with law. Consequently, whenever a person deprived of his liberty challenges his detention, it is incumbent upon the authority who detains him to show that the detention is in the exercise of a valid legal power and that the detentive power which the law gives to the executive for reasons such as public order, national security and crime prevention had been exercised strictly in accordance with the provisions of the relevant law. (p 744 f-g)

[2] Other than to require the detaining authority to show that the detention is in the exercise of a valid legal power and that the provisions of the relevant statute have been rigidly and meticulously followed, it is not for the court to investigate into the sufficiency of the reasons or grounds relied on by the detaining authority for arrest and detention. It is settled law that whether there is reasonable cause to detain is a matter of opinion and policy which can only be taken by the executive and so long as the Minister is satisfied after considering all the information available to him. It is not for the court to question how or why he became so satisfied. The court is only concerned with the procedural aspects of the exercise of executive discretion. (p 745 b-e)

[3] The ISA is an Act passed under art. 149 of the Constitution and therefore valid notwithstanding that it is inconsistent with art. 5 of the Constitution. Section 8B(1) ISA specifically provides that there shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act, save in regard to any question on compliance with any procedural requirement in the Act governing such act or decision. Even within that narrow area of possible judicial review, s. 8B(2) ISA further qualifies that the exception in regard to any question on compliance with any procedural requirement in the ISA shall not apply where the grounds are as described in s. 8A ISA. Further, by virtue of s. 8C ISA the ouster of judicial review of any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the ISA is total and all encompassing. (pp 745 h & 746 a-c)

[4] Section 73(3) ISA limits the maximum period of detention up to 60 days. The applicant had been detained for more than 30 days but not 60 days. Given that the jurisdiction is only in regard to any question on compliance with any procedural requirement in the ISA, the only issue for judicial determination was whether the detaining authority had complied with all the procedural requirements for each period of detention leading up to the present moment and it was clearly shown that each period of detention was made in the exercise of valid legal power and according to procedure. Given that all procedural requirements had been met, the detention of the applicant for the period now exceeding 30 days but yet not exceeding 60 days was still quite clearly with lawful authority. (pp 747 c, f & 749 a, g)

[5] Even if FM1 was lacking in particulars, it was not information to the applicant but to his next of kin of the grounds of his arrest. FM1 was not critically essential, for art. 5(3) of the Constitution only mandates that the arrested person shall be informed as soon as possible of the grounds of his arrest. Sufficient information had been conveyed to the applicant of the grounds of his arrest. Therefore, it could not be contended that the applicant was not informed of the grounds of his arrest and neither could it be contended that that the wife of the applicant did not know the reasons for his arrest. Rather, the reasonable deduction would be that the wife knew why he was arrested, given that she had admitted she was given FM1 stating that the applicant was arrested under s. 73 ISA and also that she had argued that the applicant could not have been involved in any activity detrimental to the security of Malaysia. (pp 749 h & 750 a-d)

[6] It was not shown that the police had deliberately and with bad faith obstructed the applicant from exercising his right under art. 5(3) of the Constitution. The police had refused visitation by relatives and counsel pending ongoing but yet unfinished investigations. That was not any denial of the right to counsel. (p 750 g)

[7] The applicant was detained pending enquiries much the same as in the position of a person being detained pending investigations under s. 117 of the Criminal Procedure Code ('CPC'). Except that detention under s. 73 ISA may lead to a s. 8 order while detention under s. 117 CPC may culminate in a trial and except that there is no trial under the ISA. The applicant could not insist that the detaining authority must act only under ordinary criminal laws. As the making of an order under s. 8 will not be the result of the trial, it was futile to argue before a court without jurisdiction to consider the material, if any, against the applicant that the allegations must be supported by evidence. (p 751 h)

[8] The right to apply for a writ of *habeas corpus* is enshrined in art. 5(2) of the Constitution. That right is not illusionary. However, as unlawful detention and *mala fides* were not shown, *habeas corpus* should be refused. (p 752 e-f)

[Application dismissed.]

Case(s) referred to:

Chong Kim Loy v. Timbalan Menteri Dalam Negeri & Anor [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731 ***(refd)***

Chong Sua Tze v. The Minister of Home Affairs & Ors And Other Appeals [1989] 1 MLJ 69 ***(refd)***

IGP v. Tan Sri Raja Khalid Raja Harun [1988] 1 MLJ 182 ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia [1969] 2 MLJ 129 ***(refd)***

KPN v. Abdul Ghani Haroon And Another Appeal [2001] 3 CLJ 853 ***(refd)***

Lee Guan Seng v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor And Another Application [1992] 3 CLJ 1440; [1992] 2 CLJ (Rep) 704 ***(refd)***

Lee Sai Wah v. PP [1968] 2 MLJ 1 ***(refd)***

Lock Wee Kock v. Menteri Hal Ehwal Dalam Negeri & Anor [1993] 4 CLJ 211 ***(refd)***

Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v. Chua Teck [1990] 1 CLJ 220; [1990] 1 CLJ (Rep) 178 ***(refd)***

Minister for Home Affairs Malaysia & Anor v. Karpal Singh [1988] 3 MLJ 29 ***(refd)***

Ooi Ah Phua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 ***(refd)***

Ooi Cheng Aun v. Timbalan Menteri Hal Ehwal Dalam Negeri [1990] 3 MLJ 108 ***(refd)***

Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649 ***(refd)***

Re Tan Sri Raja Khalid Raja Harun [1988] 1 MLJ 182 ***(refd)***

Saul Hamid Pakir Mohamad v. Inspector Abdul Fatah Abdul Rahman [1999] 6 MLJ 800 ***(refd)***

Teresa Lim Chin Chin & Ors v. IGP [1988] 2 MLJ 293 ***(refd)***

Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v. Cheow Siong Chin [1987] 2 CLJ 24; [1987] CLJ (Rep) 393 ***(refd)***

Wong Fook Nyen v. Timbalan Menteri Dalam Negeri & Ors [1988] 2 CLJ 274; [1988] 2 CLJ (Rep) 543 ***(refd)***

Yeap Hock Seng v. Minister for Home Affairs, Malaysia [1975] 2 MLJ 279 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 117, 366

Internal Security Act 1960, ss. 8(3), 8A, 8B(1), (2), 8C, 73(1)(a), (b), (3)(a), (b), (c)

Federal Constitution, arts. 5(1), (2), (3), 149

Other source(s) referred to:
DD Basu's, *Shorter Constitution of India*, 1999, 12th edn, p 187

For the applicant - Hanifah Maidin (Baharuddin Mohd Salleh); M/s Baharuddin & Partners
For the respondent - Abdul Karim Abdul Jalil SFC (Kamaruddin Mohd Said & Abasafree)

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:
This is a motion (filed on 28 August 2001) for an order that a writ of *habeas corpus* be issued to the Inspector-General of Police, to produce the applicant for release before this court.

The documents filed herein reveal that the applicant, a religious teacher at the Madrasah Al-Masriyah Simpang Renggam and a member of a political party (Parti Islam Malaysia), was arrested and detained, under s. 73 of the Internal Security Act 1960, on 2 August 2001 at 10.55am.

In her affidavit dated 28 August 2001 (encl. 2), one Fauziah bte Masran deposed that she is the wife of the applicant, that the police briefly informed her that the applicant had been detained under s. 73 of the Internal Security Act 1960 (ISA), that the present whereabouts of the applicant is unknown, that she has not been able to see the applicant since his arrest and detention, and that the applicant is not able to make the affidavit required under s. 366 of the Criminal Procedure Code. The said Fauziah bte Masran further deposed that she is concerned about the safety of the applicant, and that she believes that the applicant and other persons are accused of being involved in the activities of Kumpulan Mujahidin Malaysia. And in her affidavit, Fauziah bte Masran put forth and energetically argued that the applicant could not have been involved in any activity detrimental to the security of Malaysia.

Encik Hanifah bin Maidin for the applicant submitted that ss. 73(1)(a) and 73(1)(b) of the ISA must first be satisfied before arrest and detention of a person under s. 73. The arresting officer must be satisfied that there are grounds which would justify a detention under s. 8, and that the person to be arrested and detained has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof. Exhibit "FM1", which was delivered to the wife of the applicant at the time of the arrest and detention reflected the mind of the arresting

officer. What was in the mind of the arresting officer was that the applicant was involved in activities prejudicial to the security of Malaysia. The reason in para. 11 of encl. 7 was not set out in "FM1". "FM1" must state the grounds as in ss. 73(1)(a) and 73(1)(b). The liberty of a subject is at stake. The law must be construed strictly. Any ambiguity must be construed in favour of the subject (counsel cited *Lee Sai Wah v. PP* [1968] 2 MLJ 1). Power to detain a person without trial cannot be exercised by inference. Power must be express, clear, and unequivocal. Since s. 73 was exercised, the respondent should have put in the clear and unequivocal grounds. "FM1" and encl. 7 para. 11 are inconsistent. Whether the respondent used both limbs to s. 73(1) is in doubt. Since both limbs were not stated in "FM1", the arrest and detention is unlawful. Section 73(3) was not followed. In fact, the report to the IGP was submitted to the designated officer. It was the designated officer who submitted the report to the Minister. The designated officer was not a mere postman. The designated officer must apply his mind and prepare his report to the Minister. Since the report was submitted to the IGP, there was no material before the designated officer for him to apply his mind (counsel cited *Lee Guan Seng v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and Another Application* [1992] 3 CLJ 1440; [1992] 2 CLJ (Rep) 704). The IGP or the designated officer must apply his mind. Since the IGP received the report, but the report to the Minister was made by the designated officer, then neither the IGP nor the designated officer had applied their minds. In para. 9 of encl. 7, the designated officer said he received the report. But there is no evidence that the report was forwarded to him. Section 73(3)(c) does not say that the designated officer must satisfy himself. But the designated officer, in para. 9 of encl. 7, said that he was satisfied that the period of detention should be extended. The designated officer assumed powers that is not in s. 73(3)(c). There is no evidence that the deponent of encl. 7 is a Pegawai Turus E6B1. Exhibit "PS3" of encl. 7 did not name the designated officer. "PS3" was made in 1999; but there is no evidence that "PS3" is still valid in 2001. The allegations of the IGP are not supported by evidence. The applicant could be charged under existing law but not under the ISA. In *Chong Sua Tze v. The Minister of Home Affairs & Ors and Other Appeals* [1989] 1 MLJ 69, the Singapore Court of Appeal applied an objective test. This court should apply an objective test. The activity alleged by the IGP could be tried in a criminal court. The alleged activity does not fall within national security considerations. Article 5(2) of the Federal Constitution allows an application for *habeas corpus*. Section 8B is inconsistent with art. 5(2). If a detenu cannot complain, then what is the purpose of art. 5(2)? The right would become illusionary. There was a breach of art. 5(3). The applicant

was not informed of the grounds of his arrest and was not allowed to consult his lawyer. A request to see the applicant was refused. And finally Encik Hanifa asked, "What is the harm in the applicant seeing his lawyer?".

Encik Abdul Karim bin Abdul Jalil for the respondent submitted that the arrest and detention was in compliance with s. 73 and the Federal Constitution. At the Simpang Rengam Police Station, the applicant was informed of the reason for his arrest and detention. "FM1" was given to the wife of the applicant. "Yang penting di sini adalah pemberitahuan kepada pemohon semasa beliau di tangkap di balai polis Simpang Rengam. "FM1" adalah notis kepada isteri dan sebab itu dia tidak boleh tahu mengapa pemohon di tangkap." The controversy only concerns s. 73(3)(c). "Exhibit SS1 adalah kepada Pegawai Turus E6B1." The deponent of encl. 7 was a Pegawai Turus E6B1. "Jawatan E6B1 ada disebut di PS4." The report was forwarded to the officer concerned. The arrest and detention was in compliance with law. The deponent of encl. 7 applied his mind to extend the detention. It was not mechanical. Grounds for detention were disclosed. Details need not be given. Just the reason for the arrest is enough (Federal Counsel cited *IGP v. Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182, *Teresa Lim Chin Chin & Ors v. IGP* [1988] 2 MLJ 293, *Chong Kim Loy v. Timbalan Menteri Dalam Negeri & Anor* [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731, and *Wong Fook Nyen v. Timbalan Menteri Dalam Negeri & 2 Ors* [1988] 2 CLJ 274; [1988] 2 CLJ (Rep) 543). The applicant has an undeniable right to counsel. But that right is suspended (Federal Counsel cited *Teresa Lim Chin Chin v. Inspector-General of Police* [1988] 1 MLJ 293). There is no allegation that in bad faith the respondent had deliberately obstructed the applicant from exercising his right. The police is of the opinion that access as yet should not be given to the applicant. A detenu not having counsel is not a ground for the grant of a writ of *habeas corpus* (Federal Counsel cited *Ooi Ah Phua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198). The purpose of *habeas corpus* is to release a person illegally detained and nothing else. The issue of access by counsel should not be a ground for the grant of a writ of *habeas corpus*. 60 days detention may not lead to a s. 8 detention order. Encik Abdul Karim then referred to the yet unreported decision of the Federal Court in *KPN v. Abdul Ghani Haroon and Another Appeal* [2001] 3 CLJ 853, to rebut the argument that the alleged activities should be tried in a court of law. Encik Abdul Karim furthermore submitted that it is perfectly valid for the detaining authority to detain under detentive and not criminal laws. No *mala fides* have been shown. Detention under s. 73 and detention under s. 8 is one continuous detention. The arrest and detention was exercised under valid power. The applicant has not produced any

evidence to the contrary. Section 8B is valid, notwithstanding that it is inconsistent with the Federal Constitution. Authority is given to the IGP to appoint the designated officer. The IGP could appoint a person by office.

Encik Hanifa replied by first asking why was the reason in "FM1" different from the reasons in para. 7 of encl. 11. The actual reason must be given to both husband and wife. In his police report, the deponent of encl. 11 gave a third reason for the arrest and detention – art. 5(3). The arresting officer should explain why only one reason was given to the wife of the applicant. There was no compliance with s. 73(3)(c). The letter forwarding the report was addressed to both the IGP and the designated officer. Section 73(3)(c) does not permit the report to be made to both. The report was carbon-copied to the Secretary-General of the Ministry. The respondent had gone beyond s. 73(3)(c). Lastly, Encik Hanifa submitted that the court could review the decision, on the ground of any irrationality, procedural impropriety, and or Wednesbury unreasonableness, to which Encik Abdul Karim responded that the doctrine of Wednesbury unreasonableness cannot be applied to ISA cases.

In ISA cases, applications for a writ of *habeas corpus* are usually made after the Minister has made an order under s. 8, directing that the person sought to be released be detained for a period of two years. As yet, there is no order of detention under s. 8 of the ISA. Under what valid power then is the applicant being detained?

Article 5(3) provides that whenever, the liberty of a person is deprived and a complaint is made, the court shall inquire into the complaint and unless satisfied that the detention is lawful shall order him to be produced before the court and release him. The preceding art. 5(1) provides that no person shall be deprived of his life or personal liberty save in accordance with law. Consequently, whenever a person deprived of his liberty challenges his detention, it is incumbent upon the authority who detains him to show that the detention is in the exercise of a valid legal power (see *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182, 186), and that the detentive power, which the law gives to the executive for reasons such as public order, national security and crime prevention, had been exercised strictly in accordance with the provisions of the relevant law. For powers of preventive detention are interpreted strictly "so as to require that the provisions of the relevant statute are rigidly and meticulously complied with" (*Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649, per Edgar Joseph Jr., as he then was). An apt illustration of what is meant by strict observance of the powers of preventive detention is the case of *Ooi Cheng Aun v.*

Timbalan Menteri Hal Ehwal Dalam Negeri [1990] 3 MLJ 108, where an overnight stay in a hotel (not provided in the detention order) at the detenu's expense was held to have vitiated the detention order (note: s. 8A of the ISA now provides that a detention order shall not be invalid or inoperative by reason that the person to whom it relates was detained in any place other than a place of detention referred to in s. 8(3) or 73).

But other than to require the detaining authority to show that the detention is in the exercise of a valid legal power and that the provisions of the relevant statute have been rigidly and meticulously followed, it is not for the court to investigate into the sufficiency of the reasons or grounds relied on by the detaining authority for arrest and detention. For it is settled law, that whether there is reasonable cause to detain is a matter of opinion and policy which can only be taken by the executive (see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129), that so long as the Minister is satisfied after considering all the information available to him, it is not for the court to question how or why he became so satisfied (*Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v. Chua Teck* [1990] 1 CLJ 220; [1990] 1 CLJ (Rep) 178), that the subjective satisfaction of the Minister of Home Affairs is not subject to judicial review (*Minister for Home Affairs Malaysia & Anor v. Karpal Singh* [1988] 3 MLJ 29, that the fairness of the Minister's decision is subjective and that the court is only concerned with the procedural aspects of the exercise of executive discretion (*Theresa Lim Chin Chin & Ors v. IGP* [1988] 1 MLJ 293), that courts do not sit in appeal against the decision of the Minister regarding the material on which the detention order was made (*Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & 2 Ors* [1988] 2 CLJ 274; *Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279), that courts do not examine the adequacy or truth of these materials and cannot interfere with the decision on the ground that if the court had examined them it would have come to a different conclusion (*Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & 2 Ors; Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs, Malaysia),* and that the court cannot arrogate to itself the responsibility of judging the sufficiency or otherwise of the grounds *(Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & 2 Ors).*

Indeed, with regard to arrests and detentions under the ISA – an Act passed under art. 149 of the Federal Constitution and therefore valid notwithstanding that it is inconsistent with art. 5 – see *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182, 185; *Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1990] 1 CLJ 61;

[1990] 1 CLJ (Rep) 731; and *Ketua Polis Negara v. Abdul Haroon (supra)* – s. 8B(1) specifically provides that "there shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang Di Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision". And even within that narrow area of possible judicial review, s. 8B(2) further qualifies that "the exception in regard to any question on compliance with any procedural requirement in the ISA shall not apply where the grounds are as described in s. 8A of the ISA". One only has to read s. 8C to immediately appreciate that the ouster of judicial review of any act done or decision made by the Yang di Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the ISA is total and all encompassing. In a word, there is no jurisdiction to review any act done or decision made by the Yang di Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the ISA. The jurisdiction to review is only with regard to any question on compliance with the procedural requirements in the ISA. And in the case of the instant arrest and detention under s. 73, the procedural requirements which are set out in the same said section in the ISA, are as follows:

> (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe:
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> (a) that there are grounds which would justify his detention under section 8; and
>
> (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.
>
> (2) ...
>
> (3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:
>
> Provided that -
>
> (a) he shall not be detained for more than 24 hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than 48 hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and

(c) he shall not be detained for more than 30 days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

The language of s. 73(1) could not be any more plain or clearer; any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe (a) that there are grounds which would justify his detention under s. 8; and (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof. But that is not to say that a person could be detained for an indefinite period under s. 73. First, s. 73(3) limits the maximum period of detention under s. 73 to a maximum of 60 days, and secondly, the provisos to s. 73(3) mandate, (a) that any detention exceeding 24 hours must be with the authority of a police officer of or above the rank of Inspector, (b) that any detention exceeding 48 hours must be with the authority of a police officer of or above the rank of Assistant Superintendent, and (c) that there cannot be any detention exceeding 30 days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

As of this moment, the applicant has been detained for more than 30 but not 60 days. Given that the jurisdiction is only in regard to any question on compliance with any procedural requirement in the ISA, the only issue for judicial determination has to be if the detaining authority has complied with all the procedural requirements for each period of detention leading up to the present moment. With regard to the procedural requirement of s. 73(1), Assistant Superintendent of Police Wan Muhammad Najeeb bin Wan Ismail deposed in his affidavit (encl. 11) that on 2 August 2001 at 10.55pm and within the confines of the Simpang Rengam Police Station, he arrested the applicant in respect of whom that he had reason to believe (a) that there were grounds which would justify his detention under s. 8 of the ISA (see encl. 11 para 4) and (b) that he was a member of Kumpulan Mujahidin Malaysia that had conducted activities prejudicial to the security of Malaysia (see encl. 11 para 5). ASP Wan Muhammad Najeeb also deposed that he informed the applicant, when he arrested him, that he had reason to believe that there were grounds which would justify his detention under s. 8 of the ISA and that he, the applicant, had conducted activities prejudicial to the security of Malaysia (see encl. 11

para. 7), but that he had not disclosed further details as he was of the opinion that that would not be in the national interest (see encl. 11 para. 8). ASP Wan Muhammad Najeeb also deposed that he lodged a police report (exh. WHN1) relating to the facts of the arrest. With regard to the procedural requirement of s. 73(3), Inspector Abdul Aziz bin Abdullah of the Special Branch, Bukit Aman, Kuala Lumpur, deposed in his affidavit (encl. 10 para. 3) that on 3 February 2001 at 10.35am and pursuant to s. 73(3)(a) of the ISA he authorised the detention of the applicant for a further 24 hours, ie, from 10.55am on 3 August 2001, for reason that ongoing investigations had not been completed; and Inspector Abdul Aziz exhibited his written authorisation (encl. 10 exh. "AA1"). With regard to the procedural requirement of s. 73(3)(b), Assistant Superintendent of Police Rorete @ Clarence Rorote ak Sagon of the Special Branch, Bukit Aman, Kuala Lumpur, deposed in his affidavit (encl. 9 para. 3) that on 4 August 2001 at 10.30am and pursuant to s. 73(3)(b) of the ISA he authorised the detention of the applicant for a further 28 days, ie, from 10.55am on 4 August 2001, for the reason that ongoing investigations had not been completed; and ASP Rorete exhibited his written authorisation (encl. 9 exh. "RCR1").

Three affidavits (encls. 5 -8) relate to the procedural requirement of s. 73(3)(c). Deputy Superintendent of Police Surina bt Saad of the Special Branch, Bukit Aman, Kuala Lumpur, deposed in her affidavit (encl. 8 para. 3) that on 28 August 2001 at 11.30am she reported the circumstances of the arrest and detention of the applicant to Deputy Superintendent of Police Philip a/l Savariappan who was the "Pegawai Turus E6B1" and the officer designated under s. 73(3)(c) by the Inspector-General of Police; and DSP Surina bt Saad exhibited her covering letter (encl. 8 exh. "SS1") for her report. Deputy Superintendent of Police Philip a/l Savariappan of the Special Branch, Bukit Aman, Kuala Lumpur, deposed in his affidavit (encl. 7 para. 1 & 7) that he was a "Pegawai Turus E6B1" and the officer designated under s. 73(3)(c) by the Inspector-General of Police. DSP Philip also deposed (encl. 7 paras. 9 & 10) that he received the report from DSP Surina on 28 August 2001 at 11.30am, that he was of the opinion that the detention of the applicant be extended to facilitate ongoing investigations, and that on 28 August 2001 at 11.30am he reported the circumstances of the arrest and detention of the applicant to the Minister; and DSP Philip exhibited the document designating his office as a designated officer (encl. 7 exh. "PS2") and his covering letter (encl. 7 exh. "PS4") for his report to the Minister. And the Minister concerned, Dato' Seri Abdullah bin Haji Ahmad Badawi, deposed (encl. 5 para. 2) that he received the report on the circumstances of the arrest and detention of the applicant from DSP Philip on 30 August 2001 at 3pm.

Each period of detention, it has clearly been shown, was made in the exercise of valid legal power and according to procedure. Section 73(1) undoubtedly authorised ASP Wan Muhammad Najeeb, since he had reason to believe that there were grounds which would justify the detention of the applicant under s. 8 of the ISA and that the applicant was a member of Kumpulan Mujahidin Malaysia that had conducted activities prejudicial to the security of Malaysia, to arrest and detain the applicant. There was definitely nothing irregular or illegal about the initial arrest and detention for the first 24 hours. There was also nothing irregular or illegal about the detention for the next 24 hours, as Inspector Abdul Aziz, who had such authority pursuant to s. 73(3)(a), authorised the detention of the applicant for a further 24 hours, ie, from 10.55am on 3 August 2001. The same is also true of the detention exceeding 48 hours but not exceeding 30 days, as ASP Rorete, who had such authority pursuant to s. 73(3)(b), authorised the detention of the applicant for a further 28 days, ie, from 10.55am on 4 August 2001.

The detention now exceeding 30 days also seems to be in order with regard to both legal authority and procedure. Provided that the preceding detention is in order, the procedural requirements for further lawful detention exceeding 30 days, are, (a) a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police designated by the Inspector-General in that behalf, and (b) the Inspector-General or police designated by the Inspector-General in that behalf has reported the circumstances of the arrest and detention to the Minister. And in the present case, DSP Surina bt Saad had reported the circumstances of the arrest and detention of the applicant to the designated officer who in turn had reported the same to the Minister, even before the period of detention under s. 73(3)(b) had lapsed.

Given that all procedural requirements had been met (the carbon-copy to the Secretary did not militate against the procedural propriety), the detention of the applicant for the period now exceeding 30 days but yet not exceeding 60 days, is still quite clearly with lawful authority.

Encik Hanifa contended that "FM1" must state both ss. 73(1)(a) and 73(1)(b). But "FM1", even if it was lacking particulars, was not any information to the applicant of the grounds of his arrest. "FM1" was information to the next-of kin of the applicant of the grounds of the arrest of the applicant. "FM1" was not a critical essential, for art. 5(3) only mandates that the arrested person "shall be informed as soon as possible of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice". Here, pertinent to the first limb of

art. 5(3), ASP Wan Muhammad deposed (encl. 11 para. 7) that immediately after he had arrested the applicant he informed the applicant that he had reason to believe that there were grounds which would justify his detention under s. 8 and that he had acted in manner prejudicial to the security of Malaysia. Sufficient information regarding the grounds had been conveyed to the applicant. It could not be contended that the applicant was not informed of the grounds of his arrest. And it could not be contended, since it was stated clearly in "FM1" that the applicant was arrested under s. 73 "kerana dipercayai terlibat dalam kegiatan-kegiatan yang telah memudaratkan keselamatan Malaysia", that the wife of the applicant did not know the reason for the arrest of her husband. Rather, the reasonable deduction has to be that the wife of the applicant knew why the applicant was arrested, given that she admitted (see encl. 2 para. 8) she was given "FM1" stating that the applicant was arrested under s. 73, and also given that she argued (she could not if she knew not the grounds of arrest) that the applicant could not have been involved in any activity detrimental to the security of Malaysia.

There is also no merit in the argument that the right to counsel under art. 5(3) was denied. In *Teresa Lim Chin Chin*, the then Supreme Court per Salleh Abbas LP put forth the question "when should a detainee arrested under s. 73 of the Internal Security Act be allowed to exercise his right under art. 5(3) of the Constitution to consult a lawyer of his choice?" and unequivocally answered:

> We should reiterate what was held by the Federal Court in *Ooi Ah Phua v. Officer-in-Charge, Criminal Investigations,* in Kedah/Perlis. In other words, the matter should best be left to the good judgment of the authority as and when such right might not interfere with police investigation. To show breach of Article 5(3), an applicant has to show that the police had deliberately and with bad faith obstructed a detainee from exercising his right under the Article.

That the police had deliberately and with bad faith obstructed the applicant from exercising his right under art. 5(3) has not been shown. What appears rather is that the police had refused visitation by relatives and counsel pending ongoing but yet unfinished investigations. That was not any denial of the right to counsel (see also *Saul Hamid bin Pakir Mohamad v. Inspector Abdul Fatah bin Abdul Rahman* [1999] 6 MLJ 800). The reply (encl. 7 exh. "PS1") – "sebarang lawatan samada dari keluarga mahupun daripada peguam firma tuan akan menjejaskan proses penyiasatan polis yang kini sedang dijalankan" – did not show bad faith and should have been accepted.

To say the least, the argument with regard to DSP Surina's report to the IGP or designated officer was in sixes and sevens. First counsel submitted, "Surina bt Saad ... in fact submitted the report to the designated officer". Then contradicting himself, counsel submitted that "since the IGP received the report, but the report to the Minister was made by the designated officer, then neither the IGP nor designated officer had applied his mind" and "since the report was submitted to the IGP, there was no material before the designated officer for him to apply his mind". And seemingly oblivious to the fact that he had earlier contended that the report was submitted to the designated officer, counsel submitted, "In para. 9 of encl. 7, the designated officer said he received the report. But there is no evidence that the report was forwarded to him." With respect, the maxim *"allegans contraria non est audiendus"* meaning he is not to be heard who alleges things contradictory of each other, always applies, and counsel could not contend on the one hand that the report was submitted to the designated officer and then argue on the other that there is no evidence that the report was submitted to the designated officer. In any event, how could counsel contend that there is no evidence that the report was submitted to the designated officer. There is DSP Surina's sworn statement (encl. 8 para. 3) that she reported the circumstances of the arrest and detention of the applicant to DSP Philip who she said was the "Pegawai Turus E6B1" and the officer designated under s. 73(3)(c), and there is DSP Philip's sworn statement (encl. 7 para. 1 & 7) that he was a "Pegawai Turus E6B1" and the officer designated under s. 73(3)(c) and that he received the report from DSP Surina on 28 August 2001 at 11.30am. Given those sworn statements by DSP Surina and DSP Philip, how ever could it be contended that there is no evidence that DSP Philip was a designated officer and or a designated officer at the material time?

Counsel argued that the designated officer was not a mere postman, but should apply his mind as he prepared the report to the Minister. Yet counsel would still complain, because counsel contended that the designated officer deliberated on the matter of the extension of the detention, that the designated officer assumed powers not given in s. 73(3)(c). Counsel contended that the allegations against the applicant could be tried in a court of law. Unfortunately, the present circumstance of the applicant seems not to have been understood. The applicant is not under any preventive detention. There is no s. 8 order. Presently, the applicant is being detained "pending enquiries", much the same as in the position of a person being detained pending investigations under s. 117 of the Criminal Procedure Code (for an analogy, see *Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v. Cheow Siong Chin* [1987] 2 CLJ 24; [1987] 3 CLJ (Rep) 393, where the then Supreme Court held that "the arrest of a person

under s. 2(i) of the Restricted Enactment is no different from the arrest of a person who is alleged to have committed a crime and that his detention pending an order under s. 2(ii) of the Enactment is no different from the remand in custody of an arrested person pending trial"). Except that detention under s. 73 may lead to a s. 8 detention order, while detention under s. 117 of the CPC may culminate in a trial. And except that there is no trial under the ISA. "Detention under the ISA is a preventive detention where a person is detained without trial. A criminal proceeding and preventive detention are not parallel proceedings. The object of a criminal prosecution is to punish a person for an offence committed by him, while a preventive detention is an anticipatory measure and may not relate to an offence (see p. 187 of *D.D. Basu's Shorter Constitution of India* 12th edn 1999)" (*Ketua Polis Negara v. Abdul Ghani Haroon (supra)* per Haidar Mohd. Noor FCJ). The fact of the matter is that there is power under the ISA to detain up to 60 days pending enquiries (see *Lock Wee Kock v. Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 4 CLJ 211). The applicant could not insist that the detaining authority must act only under ordinary criminal laws. The further fact of the matter is that the making of an order under s. 8, even if it should come to that, will not be the result of a trial, and it was futile to argue before a court without jurisdiction to consider the material if any against the applicant, that the allegations must be supported by evidence.

The right to apply for a writ of *habeas corpus* is enshrined in art. 5(2). That right is not illusionary. But for the applicant to be released, unlawful detention must be shown. But that and *mala fides* have not been shown. In all the circumstances, and for the reasons herein, *habeas corpus* is refused.